PUBLIC PROSECUTOR v. MAH CHUEN LIM & ORS.

[R.Cr.J. (Syed Othman J.) January 15, 1975]
[Johore Bahru — Criminal Revision No. 1 of 1975]

Criminal Law and Procedure — Allegation that counsel has not been allowed to see his "clients" — Order by Magistrate for accused to be sent for medical observation and for access to them — Orders not made according to law — Criminal Procedure Code (F.M.S. Cap. 6), ss. 9 and 133.

Constitutional Law — Right of arrested person to consult and be defended by legal practitioner of his choice — No prescribed time — Convenient speed — Interpretation and General Clause Ordinance, 1948, s. 38 — Federal Constitution, art. 5(3).

In this case the accused were charged with murder and were produced in the Magistrate's court for fixing a date for preliminary inquiry. Counsel appearing for them made the allegation that they had been manhandled and assaulted by the police and that he had not been allowed to see them. He applied for them to be sent for medical examination and for access to them. The learned magistrate made the orders in terms of the application. The case was called up to the High Court in revision.

Held: (1) there was no complaint on oath that the accused had been manhandled or assaulted by the police and in the absence of such a complaint, the first order could not be validly made;

(2) it had not been shown in this case that the arrested persons had requested to consult and be defended by a legal practitioner of their choice and that this request had been refused and there could not be any justification for the complaint when what was shown was that a legal practitioner who had not yet been chosen to defend the arrested persons was not allowed to see them;

(3) as no time is prescribed in the Constitution within which the accused person should be allowed to consult counsel, the provisions of section 30 of the Interpretation and General Clauses Ordinance, 1948, would be applicable and therefore the right is to be given "with all convenient speed". What is "convenient speed" would depend on the circumstances of each particular case.

Case referred to:-

(1) *Buxton* v. *Buxton* 1 My. & C. 80.

CRIMINAL REVISION.

Zainuddin Ismail (Deputy Public Prosecutor) for the Public Prosecutor.

S. I. Rajah for the accused.

Syed Othman J.: My attention to this has been drawn by a report in the *New Sunday Times* of 12th January, 1975.

On 11th January, 1975 the 3 abovenamed, accused of murder, were produced in the Magistrate's Court at Johore Bahru for fixing a date for preliminary enquiry. Counsel appearing for them made the allegation from the Bar that they had been manhandled and beaten by the police and that until the day before the trial he had not been allowed to see his "clients", and applied for them to be sent for medical observation and for access to them. The learned magistrate thereupon made the orders in terms of the application.

On perusing the court's record I cannot find under what provision of law the application and by virtue of what powers the orders were made. Before me Mr. Rajah appearing for the accused persons says that the magistrate has the power to make the orders under section 9 of Criminal Procedure Code (the Code). I am afraid I cannot agree that the section enables a magistrate to make the orders. The section relates to criminal jurisdiction of the magistrate and is subject to other provisions of the Code.

As regards the first order, the 3 persons were fit to plead and, as far as I can see, considering the application the order for them to be sent for medical observation could only have been validly made under the Code if the magistrate was enquiring into an offence upon a complaint on oath. See section 133. But there was no such complaint. I feel that there should have been a complaint before the application was allowed to be heard, and in the complaint the police officers who had manhandled the arrested persons should have been named so that process could be issued against them. An allegation of this nature should be against particular persons or officers. I cannot see anything which substantiates the statement that the police as a force was responsible for mistreating the arrested persons.

As regards the second order, it appears to have been made on the mere representation that counsel had not been allowed to see his "clients" until the day before they were brought to the court. If they only met that day, I cannot see how the relationship of counsel and client could have started before this. The complaint was not relevant to the matter in issue before the court. Since it was made and this is a criminal matter, I feel it is desirable that the right of counsel as raised should be determined.

The applicable portion of Article 5(3) of the Constitution, referred to in the court below and here, says, "...an arrested person shall be allowed to consult and be defended by a legal practitioner of his choice." In my view, from this wording the right given is to an arrested person and not to a legal practitioner. The constitutional right of an arrested person to counsel cannot be equated with the right of counsel, if any, to an arrested person. Counsel is merely the object of an arrested person's right.

In the case here, it was not shown that soon after the arrest, the arrested persons had chosen any legal practitioner to defend them. Mr. Rajah, it has now been ascertained, was only instructed by the relatives of the arrested persons to see them after their arrest. This does not mean that the arrested persons had yet chosen counsel whom they would consult. It has now come to my knowledge that about the same day the same 3 persons were before the Sessions Court charged with unlawful possession of firearms. Mr. Rajah said to the court that he represented them, but then another counsel appeared and claimed that he was representing one of them. On enquiries made by the learned president, the arrested person did not even know that he had counsel to defend him. From this and from what Mr. Rajah has indicated to me here, till that very day it was somewhat uncertain if the arrested persons had chosen any legal practitioner to defend them.

There would have been grounds for complaint if it could have been shown that the request by the arrested persons to consult and be defended by a legal practitioner of their choice had been refused. But no

such request was shown to have been made. I can see no justification for complaint when what was shown was that a legal practitioner who had not yet been chosen to defend the arrested persons was not allowed to see them. In any case, the venue for a complaint of this nature is not the Magistrate's Court but the High Court.

The Constitution does not prescribe the time within which the arrested person shall be allowed to consult counsel. But section 38 of the Interpretation and General Clauses Ordinance, 1948, which applies to the Constitution (see Eleventh Schedule) reads:

"When no time is prescribed or allowed within which anything shall be done, such thing shall be done with all convenient speed and as often as the prescribed occasion arises."

(A similar provision can be found in section 54(2) of the Interpretation Act, 1967, which applies to legislation set out in section 2).

What is "convenient speed" would depend on the circumstances of each particular case. I do not think it is desirable to lay down the speed convenient to all cases. *Stroud's* Judicial Dictionary (4th ed.) contains many authorities on the meaning of "convenient speed" I need only cite the first one which appears. It reads,

"Trustees for sale are allowed a reasonable time for selling the property and though the instrument creating the trust, direct them to sell 'with all convenient speed' that is no more than is implied by law, and does not render an immediate sale imperative. Lewin (15th ed.) 591, citing *Buxton* v. *Buxton* 1 My. & C. 80 etc."

So far as the orders are concerned, I find that they were made not according to law. They are hereby quashed.

Order accordingly.